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No. 03-274

IN THE

Supreme Court of the United States

DUANE LYNN,
Petitioner,

v.

HONORABLE PETER C. REINSTEIN, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION, PARENTS OF MURDERED CHILDREN, INC., NATIONAL ASSOCIATION OF VICTIM ASSISTANCE, ALLIED EDUCATIONAL FOUNDATION, U.S. SENATOR JON KYL, AND U.S. REPRESENTATIVE JOHN SHADEGG AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2(b) of the Rules of this Court, the Washington Legal Foundation, Parents of Murdered Children, Inc., National Assocation of Victim Assistance, Allied Educational Foundation, U.S. Senator Jon Kyl, and U.S. Representative John Shadegg, respectfully move for leave to file the attached brief as amici curiae in support of the Petitioner.

The Petitioner, Respondent Honorable Peter C. Reinstein, and Real Party In Interest State of Arizona have all consented to the filing of this brief; however, counsel for Real Party in Interest Richard Glassel has been contacted and has indicated that it is unclear who is representing Mr. Glassel in this proceeding; thus, no consent can be given on his behalf until special counsel has been appointed for Mr. Glassel. Accordingly, amici must file this motion as required by Rule 37.2(b) because a party to the case has withheld consent.

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a national, nonprofit public interest law and policy center based in Washington, D.C., that devotes substantial resources to promoting crime victim rights.

In 1981, WLF published a *Crime Victims Impact Statement Manual* to serve as a model guide for implementing the use of victim impact information at the state level. WLF has appeared as amicus curiae in numerous U.S. Supreme Court and lower federal court cases that are relevant to the instant case, including cases involving victim participation at sentencing hearings. See, *e.g.*, *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Payne v. Tennessee*, 501 U.S. 808 (1991); *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997) (amicus brief supporting petition for rehearing *en banc*).

Parents of Murdered Children, Inc. (POMC), was founded in 1978 by the parents of Lisa Hullinger who was murdered that year. POMC is a national. nonprofit self-help support organization based in Cincinnati, Ohio, with chapters nationwide. Besides providing support for grieving

parents and family members, POMC provides information about the criminal justice system, and seeks to make that system responsive to the needs of the victim's family. POMC has appeared along with WLF as an amicus in several victim-related cases, including *South Carolina v. Gathers* and *Payne v. Tennessee*.

The National Organization for Victim Assistance (NOVA) is a nonprofit membership organization composed of crime victim advocates, survivors of crime and other traumatic events, and their allies and supporters. Founded in 1975, NOVA is the oldest such national association in the worldwide victims' movement. Its four purposes are to be of service to its membership, to offer direct service to victims, to be an educational resource to victim advocates and allied professionals, and to advocate for victim rights and services.

The Allied Educational Foundation (AEF) is a nonprofit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has regularly appeared before this Court as an amicus along with WLF.

United States Senator Jon Kyl is the duly elected Senator from Arizona and is a strong advocate of crime victim rights. He is a prime co-sponsor of Senate Joint Resolution 1 which proposes a Crime Victims Rights Amendment to the United States Constitution. S.J. Res. 1, 108th Cong., 1st Sess. (Jan. 7, 2003). The Resolution, cosponsored by Senator Dianne Feinstein and a bipartisan group of 24 Senators, has been favorably reported out of the Senate Judiciary Committee. Senator Kyl has a deep interest in this Court's victims' rights jurisprudence.

United States Representative John Shadegg is the duly elected Congressman from the 4th District of Arizona and is a strong advocate of crime victim rights. Representative Shadegg is a co-sponsor of House Joint Resolution 48 which proposes a Crime Victims Rights Amendment to the United States Constitution. H.J. Res. 48, 108th Cong., 1st Sess. (Apr. 10, 2003). The Resolution is pending before the House Judiciary Committee. Representative Shadegg has a deep interest in this Court's victims' rights jurisprudence.

All amici believe that the issue presented to the Court by the petition for writ of certiorari is one of national importance that should be resolved by the Court.

For the foregoing reasons, amici curiae respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Does the Eighth Amendment erect a *per se* bar against States permitting crime victims to offer an opinion on the appropriate sentence in capital cases?

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amicus WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

and family members, POMC provides information about the criminal justice system, and seeks to make that system responsive to the needs of the victim's family. POMC has appeared along with WLF as an amicus in several victim-related cases, including *South Carolina v. Gathers* and *Payne v. Tennessee*.

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All amici believe that the issue presented to the Court by the petition for writ of certiorari is one of national importance that should be resolved by the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, amici adopt by reference the Statement of the Case as presented by the Petitioner. In brief, Richard Glassel shot and killed Petitioner's wife, Nila Lynn, at a homeowners association meeting in the presence of Petitioner.

Invoking his rights under Arizona's Victims' Bill of Rights, Ariz. Const. art. 2, § 2.1(A)(4), Petitioner asked the trial court that he be allowed to give an opinion as to the sentence that should be imposed on the defendant, namely, that Glassel should be sentenced to life imprisonment rather than to death. The trial court, Arizona Court of Appeals, and the Arizona Supreme Court all denied Petitioner's request. In the meantime, the jury sentenced Glassel to death. Glassel's appeal of his conviction and sentence is pending in Arizona courts.

In its decision, the Arizona Supreme Court held that "the Eighth Amendment prohibits a victim from making a sentencing recommendation to the jury in a capital case." Pet. App. 4. In doing so, the Court acknowledged that there is a conflict on whether the Eighth Amendment *per se* excludes

victim sentencing recommendations in capital cases, a conflict spawned by this Court's decisions and language in *Booth v. Maryland*, 482 U.S. 496 (1987) and *Payne v. Tennessee*, 501 U.S. 808 (1991). In particular, while *Payne* allowed victim impact evidence in capital cases and thus, overruled *Booth* in that respect, it is unclear whether *Payne* would also allow victim sentencing recommendations in addition to victim impact evidence.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for certiorari to resolve a conflict that has developed over interpretation of its prior decisions in *Booth v. Maryland* and *Payne v. Tennessee*. The Petitioner has amply described the conflicting jurisprudence in this area. *See* Pet. at 7-17. Resolution of this conflict affords the Court the opportunity to provide clear guidance on the constitutional principles that bear on the right of victims to participate fully in the criminal justice process.

Amici primarily support the petition because it raises an issue of national importance regarding victims' rights. Amici submit that victims should have legally-protected rights to participate in the trial and sentencing of criminal defendants. These rights should not be contingent upon the discretion of prosecutors or judges. In recent years, the participation rights of victims have increasingly been guaranteed by state constitutions and statutes, as was the case in Arizona.

I. THE QUESTION OF WHETHER A VICTIM IS CONSTITUTIONALLY BARRED FROM OFFERING AN OPINION ABOUT THE APPROPRIATE SENTENCE IN A CAPITAL CASE IS AN IMPORTANT QUESTION THAT SHOULD BE RESOLVED BY THIS COURT.

The United States Constitution should not be interpreted to invalidate victim-participation rights guaranteed by state law. There is simply no basis in history or "evolving standards of decency" to invalidate such laws, whether in capital or non capital cases. It is irrelevant whether victim participation makes sentences more severe or (as could have been the case here) more lenient. Victim participation provides substantial benefits to the state and to victims as well. The states are entitled to define their criminal process so as to provide a role for victims in making a recommendation as to the sentence to be imposed in a capital case.

A. Legal History Establishes the Constitutional Validity of Victim Participation.

It is a legal fiction of comparatively recent origin that only the government has an interest in the prosecution of crimes. In England prior to the Nineteenth Century, criminal prosecution was primarily the responsibility of the victim. Public prosecutors were actually more common in the colonies at the time of the American Revolution. Still, private prosecution was accepted in the United States at the time the Eighth Amendment was adopted and for some years thereafter.[2] In light of this history, it would be hard to say that

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[2] See Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action*, 11 Pepp. L. Rev. 117, 125-32 (1984); Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J.L. & Pub. Pol'y 357, 359-72 (1986); Bruce L. Benson, *The Lost*

the Framers intended the Constitution to preclude a role for victims in the prosecution of crimes.

The shift from private to public prosecution reflects an understanding that crime harms the entire community as well as the specific victims. It was not motivated by a desire to eliminate any role for the victim.[3] Even today, private participation in some kinds of criminal prosecution persists.[4] This Court has recently noted that both the state and the victims of crime share a "powerful and legitimate interest in punishing the guilty." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998), quoting *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring).

Decisions denying interested parties a role in criminal proceedings typically are descriptive rather than normative. For example, private parties (including victims) have been denied standing to compel enforcement of criminal statutes, but the lack of standing has been related to the absence of any statute conferring a right to sue.[5] This Court's decision in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), was such a

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Victim and Other Failures of the Public Law Experiment, 9 Harv. J.L & Pub. Pol'y 399, 400-12 (1986). See also Statement of Senator Dianne Feinstein, 146 Cong. Rec. S3249 (May 2, 2000) (surveying historical evidence of private criminal prosecution in America in 18th and 19th centuries).

[3] Abraham S. Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 Law & Contemp. Probs. 225, 245 (1984).

[4] See Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell L. Rev. 282, 293 n.73 (2003).

[5] Stuart P. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 Yale L.J. 488 (1988).

case. Although stating that the victim has no "judicially cognizable interest in the prosecution or non-prosecution of another." the Court stated pointedly that "Congress may enact statutes creating legal rights, the invasion of which creates standing. . . ." *Id.* at 617, 619 n.3.

B. Arizona Law on Victim Participation Is Typical of a Large Number of Recent Constitutional and Statutory Enactments.

The Arizona Constitution contains a bill of rights for crime victims, including the right to be heard at any sentencing proceeding. Ariz. Const. Art. 2, § 2.1(A)(4). By statute, Arizona has specifically provided that the victim "may present evidence, information and opinions that concern the criminal offense, the defendant, the sentence or the need for restitution at any...sentencing proceeding." Ariz. Rev. Stat. § 13-4426(A). These provisions appear to provide a clear right for the victim to make a recommendation as to the proper sentence to be imposed in any case, including a capital case. The sole basis for the decision of the Court below was its holding that the Eighth Amendment "prohibits a victim from making a sentencing recommendation to the jury in a capital case." Pet. App. 4.

The Arizona constitutional and statutory provisions at issue in this case are typical of a wave of state enactments over the past two decades. These enactments are the product of a movement to recognize and expand the rights of crime victims, which gained substantial momentum in the early 1980s and continues today.[6]

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[6] See Frank Carrington and George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 Pepp. L. Rev. 1 (1984); U.S. Dep't of Justice, Office of Justice Programs, Office for Victims of Crime, *New Directions from the Field: Victims' Rights*

A fifty-state survey of these enactments was recently compiled and published by Professor Douglas E. Beloof.[7] This survey shows that crime victims have some right to speak at sentencing in each of the fifty states. This right to speak often does not depend upon whether any party offers the victim's testimony as evidence. By constitution or statute, some forty states provide an explicit or implicit right for the victim to make a sentencing recommendation.[8]

These recent enactments place victim participation on a different foundation than when this Court considered the issue in *Booth* and *Payne*. In those cases, the Court considered whether the state as prosecutor could present victim impact evidence in a sentencing proceeding. In Arizona and many other states today, victims participate independently and as a matter of right.[9]

Extensive victim participation legislation is powerful evidence that such rights are consistent with "evolving standards of decency." At the time of *Booth* and *Payne*, victim impact evidence was a relatively recent innovation. Today, victim participation is a well-established feature of our criminal justice system.

It is worth noting that many European countries have for some time accorded victims substantial rights of participation

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and Services for the 21st Century (1998).

[7] Beloof, *supra* note 4, at 299-305.

[8] *Id.* at 285-87.

[9] See *id.* at 284-94.

in the criminal process.[10] This aspect of comparative law indicates that victim participation in the criminal process is not an outdated vestige of primitive legal cultures.

C. A Right of Victim Participation Encourages Cooperation with Police and Prosecutors, While Discouraging Vigilantism.

When victims of crime perceive that the criminal justice system is not vindicating their interests, support for the criminal justice system, which is crucial to the apprehension and conviction of criminals, declines. "Indeed, the conclusion has become nearly inescapable: a criminal justice system that ignores the interests of or ill treats the victim runs the risk of alienating the person upon whom its success as an institution depends." [11]

Approximately half of all violent crimes are reported to the police, and of those, only about half are reported by the victims of those crimes.[12] Among the reasons why victims opt not to report crimes is the fear that the system is powerless to help them and might further victimize them.[13] Similarly,

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[10] See Cardenas, *supra* note 2, at 384-87; Gittler, *supra* note 2, at 178-81.

[11] Paul S. Hudson, *The Crime Victim and The Criminal Justice System: Time for A Change*, 11 Pepp. L. Rev. 23, 28 (1984).

[12] U.S. Dep't of Justice, Bureau of Justice Statistics Special Report, *Reporting Crime to the Police, 1992-2000* (Mar. 2003).

[13] Robert F. Kidd & Ellen F. Chayet, *Why Do Victims Fail To Report? The Psychology of Criminal Victimization*, 40 J. Soc. Issues 39-50 (1984), cited in G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne

crime victims often choose not to cooperate with prosecution of the offender, leading to dismissal of many cases.[14] Non-cooperation is caused by both the administrative problem of lack of information, and by the systemic flaw of failing to take victims' reviews and interests into account.[15]

Since victims of crime have already suffered, physically and psychologically, it is not surprising that they choose to avoid involvement in the criminal process. Studies addressing victim involvement in the criminal process suggest that there is a high correlation between victims' satisfaction and their perceptions that they influenced the outcome or that the sentencing authority was sensitive to victim issues.[16] These studies confirm that a greater role for victims in the sentencing process may positively impact on the reporting and investigation of crime.

D. Participation in the Criminal Justice System Helps to Remedy the Traumatic Effects of Crime on the Victim.

Victimization carries with it profound psychological consequences, both immediate and long term, and it is often this psychological injury that has the greatest impact on the

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L. Rev. 7, 21 (1987).

[14] Gittler, *supra* note 2, at 148. See also Hudson, *supra* note 11, at 30.

[15] See Deborah P. Kelly, *Victims' Perceptions of Criminal Justice*, 11 Pepp. L. Rev. 15 (1984).

[16] Kilpatrick & Otto, *supra* note 14, at 23-24 (citing J. Herndon & B. Forst, *The Criminal Justice Response to Victim Harm* (1984)).

victim.[17] In addition to crime-related stress caused by feelings of inequity, loss of security, perceived greater vulnerability, and perception of being deviant, crime victims are psychologically affected by the lack of any role in the criminal process. The victim quickly learns that the system's resources "are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands."[18] This realization, combined with the long duration of the capital criminal process, results in a feeling of loss of identify and additional emotional and psychological stress for the victim.[19] Permitting crime victims to participate in the proceedings can eliminate or reduce the potential for further psychological harm by reducing their perception of inequity or helplessness.[20] In particular, participation at the sentencing phase can be a cathartic experience for the victim, which helps bring an end to the psychological suffering that follows victimization.

E. The Constitution Does Not Require a Different Approach to Victim Participation in Capital Sentencing.

It is difficult to understand what theory would justify the use of victim impact evidence in a capital sentencing proceeding but deny to the victim the ability to recommend

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[17] Task Force on the Victims of Crime and Violence, *Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 Am. Psych. 107 (1985).

[18] *Id.* at 109.

[19] *Id.*; Tom Gibbons, *Victims Again: Survivors Suffer Through Capital Appeals*, 74 A.B.A. J. 64 (Sept. 1988).

[20] Kilpatrick and Otto, *supra* note 13, at 19.

what penalty should be imposed. The distinction between factual and opinion testimony might have some validity if the victim appears merely as a witness. However, as noted above, Arizona law provides for victim participation as a matter of right.

As a practical matter, the views of victims are often considered by prosecutors in deciding what penalty to seek. Allowing these views to be communicated directly to the jury in the sentencing phase does not introduce a new factor into the system for deciding whether to impose capital punishment. It simply allows the views of the victims to be communicated to both decision makers (prosecutor and jury) whose concurrence is required to impose a sentence of death.

There has been a divergence of academic views over the practical impact of *Payne*. Some believe that victim impact evidence has made the imposition of the death penalty more likely, and others have concluded that no such impact can be established.[21]

If there is considerable uncertainty about the practical impact of victim impact evidence, then there must be even more doubt as to the impact of permitting victims to add a recommendation on the penalty to the evidence that is already permitted. Where the likely impact is so vague and speculative, there is no reason to invent a constitutional rule that would invalidate so many state laws that permit victims to make a recommendation in capital cases.

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[21] For varying views expressed in symposia on victim rights, see 88 Cornell L. Rev. 257 (2003), and 1999 Utah L. Rev. 479 (1999).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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